

NOTICE:

To request limited oral argument on any matter on this calendar, you must call the Court at (916) 874-7848 (Department 54) by 4:00 p.m. the court day before this hearing and advise opposing counsel. If no call is made, the tentative ruling becomes the order of the court. Local Rule 3.04.

**Department 54
Superior Court of California
800 Ninth Street, 3rd Floor
Shelleyanne W.L. Chang, Judge
E. Higginbotham, Clerk
V. Carroll, C.A., Bailiff**

Monday, October 22, 2007, 9:00 AM

Item 1 **04AS03022 MARGARITA GETER, ET AL VS. SAC CITY UNIFIED SCHOOL DIST,ETAL**

Nature of Proceeding: Motion To Dismiss Complaint

Filed By: Trimm, Chance L.

The City's motion to dismiss this action for plaintiff's failure to appear for deposition is unopposed and is granted.

This minute order is effective immediately. No formal order nor further notice is required. CCP section 1019.5 and CRC rule 3.1312.

Item 2 **05AS01824 KENNETH MOFFAT, ET AL VS. COMBINED TRANSPORT, ET AL**

Nature of Proceeding: Motion for Order Establishing Admissions

Filed By: Sandlin, Randee M.

Plaintiffs served a Request for Admissions, set one, on defendant Stephens. The response received was unverified. Plaintiffs served a Request for Admissions, set two, and received no response. Plaintiffs request the court deem the admissions, sets one and two, admitted, as the response to set one was unverified, which is the equivalent of no response at all, and no meeting and conferring is required prior to bringing the motion (*Demyer v Costa Mesa Mobile Home Estates* (1995) 36 CA.4th 393); and no response to set two was served. Plaintiffs also seek, as a sanction, to have defendant Stephens' answer stricken as his responses to Form Interrogatories were unverified and he twice failed to appear for his deposition.

Defendants argue that Mr. Stephens has left, counsel has been unable to locate him, and all parties are aware of Stephens' absence. Defendants assert they will stipulate to liability, leaving causation and damages open to dispute. They argue this resolution addresses the equities of the situation, while not giving plaintiffs a windfall, *Brigante v Huang* (1993) 20 C.A.4th 1569, *Thomas v Luong* (1986) 187 C.A.3d 76, and urge the court to exercise its discretion and deny the motion.

The motion is granted, in part. Unlike the defendant in *Brigante*, defendant Stephens was served with summons and complaint and knows this lawsuit has been initiated against him. Unlike the defendant in *Brigante*, who was served with summons and the

complaint by publication, defendant Stephens, with knowledge of the lawsuit, has disappeared and chosen to not participate in this action, not contact his lawyers, and not participate in discovery. Furthermore, in Brigante, the effect of the admissions was to conclusively establish the plaintiff's lawsuit, all of the damages claimed, and obliterate any possible defense. Even with the Deemed Admissions, plaintiffs still have to present evidence as to their damages, and evidence regarding both defendant Stephens' percentage of responsibility and defendant Brandt's percentage of responsibility for plaintiff's damages. Furthermore, although some of the Requests for Admissions in set one, see ##3 and 17, would appear damaging to Hendrickson Trucking, Inc.'s interests, the effect of the deemed Admissions is limited, binding only on Stephens, not Hendrickson Trucking. See CCP section 2033.410. Defendant's counsel urges the court to exercise its discretion, considering the equities of the situation, by accepting counsel's offer to admit liability. Under these circumstances, however, accepting the offer would be to reward defendant Stephens for his decision to not participate in the lawsuit, and disregard his obligations regarding discovery. In considering the equities of the situation, the court exercises its discretion to grant plaintiffs request to have the admissions deemed admitted.

The Admissions, sets one and two, served on Mr. Stephens are deemed Admitted unless, prior to the hearing, Mr. Stephens serves verified, proposed responses that comply with CCP section 2033.220.

The request to have his answer stricken is denied, as having the Admissions deemed admitted is sufficient.

This minute order is effective immediately. No formal order nor further notice is required. CCP section 1019.5 and CRC rule 3.1312.

Item 3 **06AS02154 PHILIP ABARQUEZ ET AL VS. CRAIG SHERMAN ET AL**

Nature of Proceeding: Motion To Compel Attendance at Deposition

Filed By: Falcone, James J.

Defendant noticed the depositions of Philip Abarquez and Jennifer Abarquez. He states Philip did not file objections to the notice, but failed to appear. Jennifer, although noticed to appear at 9:30, did not appear until 1:00 p.m. Defendant requests an order extending time to complete discovery, "compelling Phillip Abarquez appearance for deposition October 30, 2007 at 9:30 a.m...."

Plaintiffs state that Philip's deposition was set without meeting and conferring with them and it was set for a date when Plaintiff was out of the country. Plaintiffs' counsel contacted Jennifer, who stated that, due to the recent birth of her baby and the baby's feeding schedule and the fact she would be traveling from Fremont, she could not make a 9:30 deposition. A time of 1:00 p.m. was requested but defendant would not agree as he felt it would not give him time to complete the deposition and no other date, prior to the discovery deadline, was available. Plaintiffs' counsel agreed to make accommodations by continuing the deposition later in the day or on another day. As it turned out, the deposition was concluded in 2 1/2 hours.

The request to extend the discovery deadline so that defendant can depose Philip

Abarquez on November 1, 2007, is granted. Although Mr. Abarquez failed to appear at his deposition, it was set without meeting and conferring with his counsel and his failure to appear is understandable. Upon being notified by counsel that he needed to return for a deposition, Mr. Abarquez returned from the Phillipines, where he had been visiting family, as quickly as possible and agreed to have his deposition taken upon his return.

Under the circumstances presented, defendant's request for a monetary sanction is denied. Plaintiffs' request for a monetary sanction is granted. Plaintiffs are awarded \$510 from defendant.

This minute order is effective immediately. No formal order nor further notice is required. CCP section 1019.5 and CRC rule 3.1312.

Item 4 **06AS03582 STEVEN MOK VS. RICHARD J. JACKSON ET AL**

Nature of Proceeding: Summary Judgment

Filed By: Smith, Kevin M.

This matter is continued to 11/8/2007 at 09:00AM in this department.

Item 5 **07AS00202 NORTHRN CA COLL SERVICE INC. VS. IVA WHITMIRE, ET AL**

Nature of Proceeding: Motion for Terminating Sanctions

Filed By: Cribb, Steven D.

Plaintiff seeks a terminating sanction for defendant's failure to obey a court order to serve responses to discovery and produce documents. Defendant's late-filed opposition asserts the responses were served and the documents produced as of October 18, 2007. Due to the late filing and service of the opposition, the court has not received a reply from plaintiff. The motion is continued to Wednesday, October 24, 2007 to allow plaintiff to file and serve a reply memorandum of points and authorities as well as a declaration supporting the request for a monetary sanction, to include hours and rate. The reply documents to be filed and served no later than Monday, October 22, 2007. The reply documents should be filed directly in department 54.

Item 6 **07AS00746 MICHAEL JAMES HEDIN VS. FIREDANCE LOUNGE, INC ET AL**

Nature of Proceeding: Motion For Judgment On Pleadings

Filed By: Hughes, Gavin M.

Plaintiff alleges that, while lawfully on defendant's premises, plaintiff was knocked over, fell to the floor, and was harmed during a scuffle between defendant Hollis (alleged to be an employee of defendant Firedance Lounge), other unidentified employees of defendant Firedance Lounge, and a patron. Plaintiff's complaint includes causes of action for battery; respondeat superior; negligent training, hiring, supervision or retention of unfit employees; and negligence.

Defendants Hollis and Firedance Lounge move for judgment on the pleadings as to the

entire complaint, arguing plaintiff fails to state facts sufficient to constitute any causes of action against them. In addition, defendants argue the complaint fails to state sufficient facts to permit recovery of punitive damages.

In support of their motion, defendants state facts that are not plead in the complaint. In making its ruling, the court disregards any facts in the memorandum of points and authorities that are not plead within the four corners of the complaint.

Defendants argue plaintiff fails to plead facts alleging any contact between him and defendant's employees. Plaintiff alleges that he was knocked over and fell during a scuffle between Hollis (an employee), other unidentified employees and a patron and that defendants acted with the intent to make a harmful contact with plaintiff's person. At this stage, the allegations are sufficient to show contact between plaintiff and the people involved in the scuffle, several of which were defendant's employees.

Since defendants moved for judgment on the pleadings as to the entire complaint, if any cause of action is stated, the motion must be denied. The court therefore does not discuss the other causes of action to determine if they state a cause of action as it has determined plaintiff states a cause of action for battery.

The court does note however that a motion for judgment on the pleadings, either common law or statutory, is not the proper method of seeking a ruling that plaintiff has not stated sufficient facts entitling him to punitive damages.

Defendants to file and serve their answer(s) no later than Thursday, November 1, 2007.

This minute order is effective immediately. No formal order nor further notice is required. CCP section 1019.5 and CRC rule 3.1312.

Item 7 **07AS00786 EUGENE E. WELLS VS. KEVIN TOWLE ET AL**

Nature of Proceeding: Motion to Enforce Settlement

Filed By: Hibbert, Paige M.

Plaintiff seeks judgment pursuant to CCP section 664.6, contending the parties settled this lawsuit and, pursuant to the settlement, defendant's company, Waterworks, Inc. was to sign a new AIR Real Estate Lease, as well as sign a Personal Guaranty within two weeks of execution of the Agreement. The time has passed and neither has been executed, plaintiff argues.

Defendants agrees the agreement should be enforced, however they argue they have fully performed and it is plaintiff who is in breach. Defendants contend they agreed to reduce the amount of space they leased from plaintiff and drastically reduced the term of the lease in exchange for a full dismissal of claims by plaintiff and receipt of a corporate note held by plaintiff. They argue they have performed the necessary terms of the agreement, relinquishing a large portion of the leased area to plaintiff and have made payment of the agreed rent. Plaintiff accepted the rent payments and took possession of the area relinquished by them. However, they contend plaintiff has not turned over the corporate note and has not dismissed the action, as he agreed to do in

the settlement.

Defendants argue the parties are already subject to the terms of the original lease, modified only by the length of the lease term, the amount of space occupied by the defendants and the amount of rent paid. Plaintiff has in his possession fully executed personal guarantees from defendants. Therefore a lease and personal guarantee already exists between the parties and defendants have "performed the necessary terms of the agreement."

Defendants assert plaintiff submitted an Office Lease document, which was inapplicable and contained terms and conditions beyond the prior responsibility of defendants under the existing lease. They, in turn, provided two alternate versions of a lease to plaintiff, including a 4-page AIR form lease, but plaintiff rejected them and instead filed the motion.

According to defendants, the agreement contains a provision that the settlement agreement is "fully enforceable even if further documents are not prepared or signed by the parties." They argue this "savings clause" was included to avoid the exact dispute and costs being suffered by this motion. Defendants argue the agreement is fully enforceable even if a new lease and personal guarantee were not prepared or signed. They argue it is plaintiff who has not complied with the terms of the settlement agreement.

The agreement provides that "the parties agree to execute all further documents necessary to effectuate the terms of their (sic) agreement. However this agreement is fully enforceable even if further documents are not prepared or signed by the parties." The court interprets this provision as allowing it, pursuant to a motion under section 664.6, to enforce the agreement, regardless of whether the parties execute further documents. It can enforce the agreement by requiring the parties to execute further documents and undertake further acts.

Counsel for both parties shall meet at a mutually agreeable location on October 26, 2007, at 12:00 noon, for the following exchange of documents:

Wells is ordered to turn the original note over to Towles and Carnation by delivering it to Peter C. DeGolia no later than Friday, October 26, 2007.

Wells is to prepare a new AIR form lease containing the new terms of the lease (see p.2, items 4-6 of the settlement agreement) and Waterworks shall execute the new lease, no later than Friday, October 26, 2007.

Wells to dismiss this action no later than Friday, October 26, 2007.

Defendants Towle and Carnation to execute new personal guarantees no later than Friday, October 26, 2007.

All requests for attorney's fees and costs are denied.

This minute order is effective immediately. No formal order nor further notice is required. CCP section 1019.5 and CRC rule 3.1312.

Item 8 **07AS00944 JACKIN BOX CORP, ET AL. VS. BRUCE BEHRENS, ET AL.**

Nature of Proceeding: Motion To Withdraw Attorney of Record

Filed By: Quay, Curtis

The motion to withdraw as counsel for plaintiff Jackin Box is dropped. Counsel has not used the forms required by C.R.C. rule 3.1362: Civil forms MC-051, MC-052 and MC-053. The rule is strictly enforced for the protection of counsel.

Item 9 **07AS01921 GAYE WELCH-BROWN VS. STATE OF CA , ET AL**

Nature of Proceeding: Motion For Reconsideration of Order Declaring Plaintiff Vexatious Litigan

Filed By: Welch-Brown, Gaye

Plaintiff, under the guise of seeking reconsideration of the September 5, 2007 court order declaring her a vexatious litigant, seeks to have the court reconsider its August 20, 2007 ex parte decision (see Local Rule 3.12(A)(2)) denying plaintiff's request that the clerk enter defendant's default. Plaintiff filed a Petition for a Writ of Mandate, which was summarily denied by the Court of Appeal. Plaintiff also requests permission to renew her application for relief from the court clerk's refusal to enter default backdated to August 1, 2007, so she can provide the "new and different facts and circumstances" required by CCP section 1008.

The motion for reconsideration is denied. It is untimely, as more than 10 days have passed since plaintiff was given notice that her application to have the clerk enter a backdated default was denied. See plaintiff's RJN, p. 48. During that time period, plaintiff chose to file a Petition with the Court of Appeal and Request a Stay. The fact that her Petition and Request were denied is not a "new or different" fact justifying her failure to timely bring a request for reconsideration. Nor does plaintiff's filing a copy of her original application with her Petition for Writ of Mandate, with a copy being served on the Court, serve as the "functional equivalent of raising the same argument" with the court for purposes of fulfilling the ten day requirement of CCP section 1008. The court will not reconsider this matter on its own. *Le Francois v Goel* (2005) 35 C.4th 1094. In addition, plaintiff did not oppose the motion to have her declared a vexatious litigant and does not explain why these facts could not have been presented then. Finally, the August 20 ex parte decision was on the merits, and the record does not support plaintiff's argument the Court of Appeal denied her writ petition because it was premature. Plaintiff's RJN, p. 48 and first page after page tabbed Exhibit 1. The court denies plaintiff's request to renew her application; it is not based on new or different facts and is also untimely.

Oral argument is not allowed.

This minute order is effective immediately. No formal order nor further notice is required. CCP section 1019.5 and CRC rule 3.1312.

Item 10 **07AS03714 LARRY E. ODBERT VS. FIDELITY NATIONAL FORECLOSURE, ET AL**

Nature of Proceeding: Demurrer

Filed By: Stewart, Brian P.

The demurrer and motion to strike are dropped. The court's records indicate the entire action was dismissed.

Item 11 **07AS03714 LARRY E. ODBERT VS. FIDELITY NATIONAL FORECLOSURE, ET AL**

Nature of Proceeding: Motion To Strike Portions of the Complaint

Filed By: Stewart, Brian P.

See ruling in item #10.

Item 12 **07AS04318 YU CHEN VS. SAMANTHA THI PHAM**

Nature of Proceeding: Writ Of Attachment

Filed By: Macy, James B.

This matter is dropped from calendar.

Item 13 **07CS00598 PEOPLE OF ST OF CA VS. \$504.00 IN U.S. CURRENCY (PRUITT)**

Nature of Proceeding: Motion To Compel Production of Documents

Filed By: Leonard, Stephanie

The People's motion is unopposed and is granted, in part. Keileah Pruitt is ordered to serve a verified response, without objections, to the People's Request for Production of Documents, set one, no later than Thursday, November 1, 2007.

The request for a monetary sanction is denied as the motion is unopposed.

This minute order is effective immediately. No formal order is required. The People are to serve Keileah Pruitt with notice of the court's ruling no later than Monday, October 22, 2007. CCP section 1019.5 and CRC rule 3.1312.

Item 14 **07CS01128 IN RE: LUZ HERNANDEZ**

Nature of Proceeding: Petition For Change Of Name

Filed By: Hernandez, Luz

The Petition for Change of Name is granted on condition proof of publication is filed in department 54 by the time of the hearing.

Item 15 **07AM10816 BEAZER HOMES HOLDINGS CORP VS. MILL CABINET LOCAL UNION 1618**

Nature of Proceeding: OSC RE: Preliminary Injunction

Filed By: Pytel, John C.

This matter was dropped from calendar at the request of the moving party.

Item 16 **07ED07560** **STATE OF CALIFORNIA, ET AL VS. GINA D. JONES**

Nature of Proceeding: Claim of Exemption

Filed By: Trujillo, A.

Claim of exemption is denied. The Sheriff is directed to garnish \$200 per month from the judgment debtor's earnings. Any amounts retained in excess thereof are to be returned to the judgment debtor forthwith.

Item 17 **07ED28262** **STATE OF CALIFORNIA, ET AL VS. DANA L. RAY**

Nature of Proceeding: Claim of Exemption

Filed By: Vives-Almodovar, R.

This matter is dropped from calendar.
